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CITATIONS

760-859—65——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 360

A. M. HARMAN, JR., ET AL., APPELLANTS

v.

LARS FORSSENIUS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the district court (R. 42–50) is not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on May 29, 1964 (R. 51). Notice of appeal to this Court was filed on June 11, 1964 (R. 52). Probable jurisdiction was noted on October 12, 1964 (R. 114). The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Twenty-fourth Amendment is printed in the Argument, *infra*, p. 8. Section 24—

17.2 of the Virginia Code 1964 Supp.)—the only statute directly in suit[1]—appears in the printed Record, p. 9. Related Virginia statutes are likewise printed in the Record, pp. 7–16.

QUESTION PRESENTED

Whether Section 24–17.2 of the Code of Virginia—which requires a voter in a federal election either to pay a poll tax or to file a witnessed or notarized certificate declaring himself a current resident of Virginia and a resident since his registration and giving assurance of his intention not to remove from the city or county prior to the next general election—contravenes the Twenty-fourth Amendment to the Constitution of the United States.

INTEREST OF THE UNITED STATES

For the first time, this Court is called upon to construe the Twenty-fourth Amendment to the Constitution of the United States. That Amendment—which frees federal elections from the poll tax—may be viewed as part of a continuing national effort to remove undue obstacles to full and fair participation in the electoral process, a concern reflected in the Civil Rights Acts of 1957, 1960 and 1964. Charged with enforcement of these statutory provisions, the United States is particularly sensitive to devices which may

[1] Section 24–17.2 is part of Chapter 2 of the Acts of the special 1963 session of the Virginia legislature, which is permanent legislation. Chapter 1 of the same session was temporary legislation for 1964, which has no continuing force. Accordingly, the judgment below is moot insofar as it invalidates portions of Chapter 1.

unconstitutionally restrict the franchise. See, *e.g.*, *United States* v. *Mississippi*, No. 73, O.T. 1964; *Louisiana* v. *United States*, No. 67, O.T. 1964. Believing that the Virginia statute in suit would rob the Twenty-fourth Amendment of its promise, we deem it appropriate for the United States to express its views.

STATEMENT

A. THE PLEADINGS AND PROCEDURE

Prior to the adoption of the Twenty-fourth Amendment, the Virginia Constitution (Article II, Section 18) and statutes (Code §§ 24–67 and 24–17) provided a uniform rule for the registration and voting of electors in both federal and State elections, primary and general. The requirements were: (1) a minimum age of 21 years; (2) residence within the State for one year ~~and in the residence within the state for one year~~ and in the city or county for six months, and (3) payment "at least six months prior to the election * * * to the proper officer all State poll taxes [$1.50 annually] assessed or assessable against him [the elector] for three years next preceding such election."

In 1963, Virginia enacted two statutes which became effective upon promulgation of the Twenty-fourth Amendment. These statutes (Va. Acts, 1963 Extra Sess., Chapters 1 and 2) [2] directed a division of the registration and voting qualifications into two classes, federal and State (R. 7, 8). Two changes

[2] Chapter 2 is now codified as Section 24–17.2 of the Code of Virginia of 1950 (Supp. 1964). Chapter 1—applicable to 1964 elections only—has not been codified.

were made in the law applicable to federal elections: (1) the payment of a poll tax as an absolute prerequisite to registration and voting was withdrawn (R. 8); and (2) a certificate of residence was required from the federal elector unless, "at his option," he chose to pay the poll tax (R. 9). The certificate must be filed with the treasurer of the voter's county or city no earlier than October 1 of the year immediately preceding that in which he offers to vote and no later than six months prior to the election (R. 9). The certificate must state the elector's street address; that he is currently a resident; that he has been one continuously from the time of his registration; and that he does not presently intend to remove from the city or county in which he is a resident prior to the next general election (R. 9–10). Thus, a citizen who has paid all the assessable poll taxes may vote in both federal and State elections. If he has not paid such taxes he cannot vote in a State election, but may vote in a federal election upon filing the certificate of residency.

The present appeal originated as two separate class actions attacking the foregoing provisions of the 1963 Virginia Acts as violative of Article I, Section 2, of the United States Constitution and the Fourteenth, Seventeenth, and Twenty-fourth Amendments.[3] The complaints, which asked for declaratory and injunc-

[3] Plaintiff Forssenius is Vice-Chairman of the Young Republican Federation of Virginia, a citizen of Virginia, and did not pay his tax for 1963. Plaintiff Henderson, is Chairman of the Republican Party of Virginia, a citizen of Virginia, and did pay his tax in 1963.

tive relief, named as defendants (appellants here) the three members of the Virginia State Board of Elections and, in one case, the County Treasurer of Roanoke County, Virginia, and, in the other, the Director of Finance of Fairfax County, Virginia (R. 1–5, 19–22). The jurisdiction of the district court was invoked pursuant to 28 U.S.C. 1331, 1343, and 2201, and the right to maintain the suits were asserted under 42 U.S.C. 1983 and 1988.

On March 23, 1964, appellants filed in each case a motion to stay any decision on the merits in order to give the Virginia courts an opportunity to resolve the issues and interpret the statutes attacked (R. 26–30). At the same time, motions to dismiss were filed. In *Forssenius,* Civ. No. 3897, the motion was based on a failure to join indispensable parties (R. 31). In *Harman,* Civ. No. 3898, the movants alleged, in addition, failure to state a claim upon which relief could be granted and failure to state a justiciable controversy (R. 33). Appellants also filed answers at the same time, which averred that the complaints failed to state a claim upon which relief could be granted or to state an actual controversy, and generally denied the other allegations (R. 35–39).

B. THE DISTRICT COURT'S DECISION

After trial before a statutory court of three judges—convened in accordance with the prayers in the complaints (R. 4, 22)—the court held that the certificate of residence required of federal electors in Virginia in lieu of a poll tax was an additional burden not required of State electors and thus a different "qual-

ification" in violation of the requirements of Article I, Section 2 and the Seventeenth Amendment. The court rejected appellants' argument that the qualification, *i.e.*, residence, remained the same, and that only the manner or proving the qualification was different. Overruling the contention that the local electoral board, the registrars and the clerks of court were indispensable parties, the court entered an order declaring the challenged portions of the 1963 Acts invalid and enjoining appellants from requiring compliance by an elector with such provisions (R. 51).

ARGUMENT

I

INTRODUCTORY

The court below, in invalidating the statutes in suit, held that they contravene Article I, Section 2 of the Constitution and the Seventeenth Amendment, which provide that electors for Representatives and Senators shall have the qualifications requisite for electors of the most numerous branch of the State legislature. Conceding that a State is not precluded from retaining or prescribing the payment of a poll tax as an absolute condition of voting in State elections, the court concluded that under the Virginia statutes the qualifications for voting in federal and State elections differ because, in order to vote in federal elections, a voter must file a certificate of residence.[4] In reach-

[4] The court so held notwithstanding the fact that, by paying a poll tax, a federal elector could vote without being subjected to requirements different from those imposed on a State elector.

ing this conclusion, the court rejected appellants' argument that the certificate of residence requirement does not result in a variance of the *qualifications* for voting in State and federal elections, but only in the means of proving the underlying qualification, *i.e.*, residence.

We submit that this Court should avoid the far-reaching issue under Article I, Section 2, and the Seventeenth Amendment, for several reasons. *First*, Article I, Section 2, and the Seventeenth Amendment govern only *congressional* elections; they do not reach Presidential elections. Accordingly, those provisions alone do not seem to support that part of the judgment below that enjoins the use of the certificate in Presidential elections. *Second*, the issue of what constitutes a substantive "qualification" for voting—as distinguished from a procedure for ascertaining whether an individual possesses that qualification—has broad implications, particularly in relation to the power of Congress to regulate the electoral process—a power which Congress has exercised frequently in recent years in the Civil Rights Acts of 1957, 1960 and 1964. *Third*, as we presently will show, the statutes are clearly invalid under the Twenty-fourth Amendment, and it is, therefore, unnecessary to decide more.[5]

[5] We do not discuss the procedural issues—the appropriateness of "abstention" in this case and the claimed indispensability of certain parties. It seems plain that both questions were correctly decided below.

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II

THE STATUTE IN SUIT IS REPUGNANT TO THE TWENTY-FOURTH AMENDMENT

Section 1 of the Twenty-fourth Amendment provides:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Henceforth, of course, no State could directly bar the franchise to "federal electors" for failure to pay any tax. Thus far, Virginia complied. Upon ratification of the Amendment in January, 1964, new laws provided that payment of the poll tax—which was retained—would no longer be an *absolute* prerequisite to voting in "federal" elections. But, at the same time, the State invited its citizens to waive the benefit of the exemption by imposing a burdensome substitute requirement—embodying some of the evils of the traditional poll tax—on those who invoked the Twenty-fourth Amendment. The question here is whether the exaction of such a price for claiming a constitutional immunity may stand.

The answer is not in doubt. Familiar principles bar the imposition of a penalty on those who would exercise a right guaranteed by the Constitution. See *Frost & Frost Trucking Co.* v. *Railroad Commission of Cali-*

fornia, 271 U.S. 583, 592;[6] *Terral* v. *Burke Construction Co.,* 257 U.S. 529, 532. Moreover, here, as in the Fifteenth Amendment, the Constitution does not alone bar an outright "denial" of the franchise; it also expressly guarantees that the right to vote shall not be "*abridged.*"[7] The Twenty-fourth Amendment, too, "hits onerous procedural requirements which effectively handicap exercise of the franchise" by a class of qualified voters. Cf. *Lane* v. *Wilson,* 307 U.S. 268, 275. Thus, in *Gray* v. *Johnson,* 234 F. Supp. 743 (S.D. Miss.), the court struck down, as an impermissible abridgement of the immunity conferred by the Twenty-fourth Amendment, a comparable Mississippi provision requiring federal electors who would not pay the traditional tax to obtain an annual "poll tax receipt" (albeit without payment).[8] The same principle dictates a like result here.

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[6] The Court said in *Frost.* (271 U.S. at 593):

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.

[7] The language of the Amendment was chosen advisedly. As Representative Halpern, one of its proponents, noted, "it is broad enough to prevent the defeat of its objectives by some ruse or manipulation of terms." 108 Cong. Rec. 17669.

[8] In a *per curiam* opinion, the statutory three-judge court (Circuit Judge Bell and District Judges Clayton and Cox) stated (234 F. Supp. at 746):

> It may not be gainsaid from any fair reading and interpretation of the act that its onerous requirements are occasioned solely by reason of the failure of the registered

It remains only to show that the Virginia statute in suit in fact imposes "onerous [procedural] requirements" on those who refuse to surrender their constitutional right to vote in federal elections without paying the prescribed poll tax. At the outset, however, it is important to emphasize that the question here is not whether the new requirement would be "reasonable" if applied to all voters without reference to the Twenty-fourth Amendment. We may assume it would be. Rather, since Virginia establishes differ-

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voter to pay his poll tax. Such a voter after 1964, must have two such poll tax receipts, both dated on or before February 1 for the two years next preceding the election at which he offers to vote. He has thus been excused literally from paying the tax as such but by reason of the non-payment thereof he has been required to get the requisite poll tax receipts within a fixed time * * *.

The word "abridge", according to Webster's New International Dictionary, Second Edition, means to diminish or curtail; to deprive, to cutoff. When the word is used in connection with and following the word "deny", it means to circumscribe or burden. It was the clear intention and purpose of the Twenty-fourth Amendment to the Federal Constitution that neither the United States, nor any state should impair the vested right of a duly registered voter to vote by reason of his failure to pay a poll tax. No state is thus permitted to circumscribe or burden or impair or impede the right of a voter to the free and effective exercise and enjoyment of his franchise in any election for a Federal official "by reason of failure to pay any poll tax", as the amendment expressly provides.

The court also held that the Mississippi statute discriminated against federal exemptees, since persons exempted by Mississippi law from paying the poll tax could vote merely by obtaining a single exemption slip from the county clerk, good for all time—a procedure less onerous than the requirement, applicable to federal exemptees, that a yearly "poll tax receipt" be obtained. (234 F. Supp. at 746).

ent eligibility rules applicable to federal electors alone—and only those who assert their exemption from the poll tax—the question is whether those rules impose a substantial burden which infringes the immunity conferred by the Amendment. Nor does it save the alternative requirement for federal electors if it is no more onerous, or even somewhat less onerous, than the poll tax. For federal elections, the poll tax is abolished absolutely as a prerequisite to voting and no "equivalent," or milder "substitute," is permissible. Any device which effectively subverts, even in part, the effectiveness of the Twenty-fourth Amendment must fall under it.

There can be no question that the statute in suit erects a real obstacle to voting in federal elections. As already noted, the new requirement for those who would participate in choosing their national officers without paying the poll tax is that they file annually, within a stated interval ending six months before the election, a notarized or witnessed certificate attesting that they have been continuous residents of the State since the date they registered (perhaps many years ago, under Virginia's system of permanent registration) and will reside in their present locality until the forthcoming election (at least six months hence). Va. Code, § 24–17.2 (R. 9–10). It is not clear how one obtains the necessary certificate form. The only provision made is for distribution of the form to county and city court clerks and local registrars. Va. Code, § 24–28.1 (R. 10–11). So far as appears, then, the federal elector who would invoke his Twenty-fourth

Amendment right must take the initiative of obtaining the form from one of these officials, complete it, have it witnessed or notarized, and deliver it "in person or otherwise" to a different official, the county or city treasurer. See Va. Code, § 24–17.2(a)–(b) (R. 9). That is plainly a cumbersome procedure. In effect, it amounts to an annual re-registration, which Virginians so sharply contrast with the "simple" poll tax system.[9] But the most serious obstacle is perhaps the requirement that all this be done within a specified interval, at least six months prior to the election involved. For many, at least, it must seem far preferable to conform to the old familiar practice of mailing in the $1.50 poll tax when the bill arrives at the door, some six months before the cut-off date.[10]

As we understand them, however, appellants do not deny that the new residence certificate alternatively required of federal electors amounts to a substantial

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[9] See, *e.g.*, the testimony of Judge Old before the House Judiciary Committee, defending the poll tax system as enabling Virginia "to avoid the burdensome necessity for annual registration." Hearings on S.J. 29, 87th Cong., 2d Sess., p. 81. See, also, *id.*, pp. 98–99 (Attorney General Button); 108 Cong. Rec. 4532 (Senator Byrd); 108 Cong. Rec. 4641 (Senator Robertson); R. 73, 76 (Governor Harrison).

[10] The requirement that the poll tax be paid "personally" by the voter (Va. Code, § 24–17, R. 8) is not construed as compelling him to physically appear "in person" before the local treasurer. In practice, at least, it may be simply mailed in. See Hearings, *supra*, p. 81 (Judge Old). The poll tax bill is mailed to the residence of the prospective voter (App. Br. 19, 22) some time in November and payment—for election qualification purposes—may be delayed until the following May. See Hearings, *supra*, pp. 95–96 (testimony of Asst. Atty. Gen. Lee and Congressman Tuck).

requirement. Their defense is, rather, that it is a *necessary* substitute proof of residence, serving the same function as the poll tax. On the face of it, the argument is remarkable, since it posits that the poll tax is nothing more than a convenient means of proving residence [11] and assumes that the Twenty-fourth Amendment, though outlawing the poll tax for federal elections, would condone the same result accomplished by a new expedient. It is difficult to see why the claimed similarities in purpose and effect between the poll tax and the residence certificate are thought to save, rather than condemn, the new requirement. But, in any event, the underlying premise of the argument—that the poll tax serves as a trustworthy test of continuing residence—is demonstrably false, and, without that foundation, the whole structure collapses.

On this point, the emphatic statement of the court below—composed of three Virginia judges—is persuasive (R. 47):

> The argument is that the poll tax payment requires all that the certificate requires. This view cannot stand against the obvious fact that

[11] This characterization of the poll tax is, of course, at odds with the arguments by Virginia's spokesmen before the Congress to the effect that the Twenty-fourth Amendment would repudiate the long-standing constitutional rule that the States retained the prerogative of fixing (albeit indirectly) the "qualifications" of electors for federal Representatives and Senators. See, *e.g.*, 108 Cong. R. 4528–4530 (Senator Byrd), 4635–4644 (Senator Robertson); Hearings, *supra*, pp. 75–76, 78 (Lieutenant-Governor Godwin); pp. 85–86, 89 (Hugh V. White, Jr., Director of Virginia Commission on Constitutional Government).

> the payment of the poll tax does not entail a procedure which is trustworthy in vouching residence. That the tax payment will be accepted in satisfaction of residential requirements even in a Federal election, despite its almost total deficiency as evidence of residence, reveals the certificate as an independent or superadded qualification.

There is no rebuttal. The suggestion is that voluntary payment of the tax six months before an election is to be expected only of residents who intend to remain in the State. But the same is true of registration or voting: normally, only residents with some expectation of remaining will take the trouble to register and vote. Nor is the timing of the payment relevant to residence. The only real claim is that the poll tax serves "to prevent fraudulent voting by persons once registered who [are] no longer residents" (App. Br. 3). In short, according to appellants, the requirement strikes at those few former eligible voters, still registered, who have moved away but might wish to return to vote without having re-established residence. We may be permitted to doubt how many such determined persons exist. But, whatever their number, are these "poll-crashers" likely to be deterred by the payment of a nominal tax which can be mailed in in advance?

The plain fact is that the poll tax is not a proof of residence. Indeed, on its face, it does not purport to be. Unlike the certificate devised for federal electors, payment of the tax is accompanied by no declaration of prior residence or of intent to remain. The

poll tax does share one important characteristic with the new certificate, however. It is this: that, in both instances, the requirement of action six months before casting a ballot tends to eliminate from the franchise a substantial number who do not plan so far ahead, at a time when political campaigns are still dormant and election day is half a year away. That effect, recognized as an evil of the poll tax which the Twenty-fourth Amendment was meant to wipe away,[12] is now preserved.

In sum, the new requirement attempts to perpetuate the practical barrier erected by the poll tax regime. It accordingly offends the Twenty-fourth Amendment.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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[12] See Hearings, *supra*., pp. 14–15, 52, 95.

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